



1 Summary Judgment.

2 **JURISDICTION**

3 On August 6, 2007, Plaintiff filed a Title II application for  
4 a period of disability and disability insurance benefits, alleging  
5 disability beginning December 1, 2004, and later amended the onset  
6 date to September 30, 2007. Tr. 21; 38. Plaintiff reported that  
7 his ability to work was limited by a pinched nerve, bad back,  
8 tiredness, depression and schizophrenia. Tr. 199. He explained  
9 that his condition causes him severe emotional problems, fatigue,  
10 back pain, impedes his memory and concentration, and he is unable to  
11 "deal with people." Tr. 199. Plaintiff's claim was denied  
12 initially and on reconsideration, and he requested a hearing before  
13 an administrative law judge (ALJ). Tr. 56-133. A hearing was held  
14 on April 16, 2010, at which vocational expert Scott Witmer,  
15 Plaintiff's wife Sylvia Pola, and Plaintiff, who was represented by  
16 counsel, testified. Tr. 35-54. ALJ Kim D. Parrish presided from  
17 Oklahoma City. Tr. 37. The ALJ denied benefits on May 28, 2010.  
18 Tr. 21-30. The instant matter is before this court pursuant to 42  
19 U.S.C. § 405(g).

20 **STATEMENT OF THE CASE**

21 The facts of the case are set forth in detail in the transcript  
22 of proceedings and are briefly summarized here. At the time of the  
23 hearing, Plaintiff was 48 years old. Tr. 40. He earned a high  
24 school diploma, and his past jobs included working as a certified  
25 nurse's aide and as a janitor. Tr. 40; 50.

26 Plaintiff testified that as a child, he was physically and  
27 sexually abused, and he was raised by a single mother. Tr. 42. He  
28 said that in 2007, he frequently experienced thoughts of suicide.

1 Tr. 42-43.

2 Plaintiff testified that his back and hips hurt, and he is  
3 often tired. Tr. 43. He said he does not sleep well and during the  
4 night he worries and checks multiple times to ensure the door is  
5 locked. Tr. 44. He said he suffers from anxiety, during which he  
6 becomes frightened, and his mind and heart start racing. Tr. 46.  
7 Plaintiff's wife testified that he rarely leaves the home, and if he  
8 does occasion into a store with her, he is loud and makes rude  
9 comments about other people. Tr. 48.

10 **ADMINISTRATIVE DECISION**

11 At step one, the ALJ found that Plaintiff had not engaged in  
12 substantial gainful activity since during the period from his  
13 alleged onset date of September 30, 2007, through his date of last  
14 insured. Tr. 23. At step two, he found Plaintiff had the severe  
15 impairments of schizoaffective disorder, antisocial disorder, and  
16 histrionic personality disorder. Tr. 23. At step three, the ALJ  
17 determined Plaintiff's impairments, alone and in combination, did  
18 not meet or medically equal one of the listed impairments in 20  
19 C.F.R., Subpart P, Appendix 1(20 C.F.R. §§ 416.920(d), 416.925 and  
20 416.926). Tr. 23. The ALJ found Plaintiff has the residual  
21 functional capacity ("RFC") to perform a full range of work at all  
22 exertional levels but with the following nonexertional limitations:  
23 "the claimant requires to work [sic] in relative isolation with  
24 limited contact with peers, supervisors, and the general public.  
25 The claimant is able to sustain concentration necessary for  
26 unskilled work." Tr. 24.

27 In step four findings, the ALJ found Plaintiff's statements  
28 regarding pain and limitations were not credible to the extent they

1 were inconsistent with the RFC findings. Tr. 25. Also, the ALJ  
2 found that Plaintiff is unable to perform past relevant work. Tr.  
3 28. The ALJ concluded that jobs exist in significant numbers in the  
4 national economy that Plaintiff can perform, and identified  
5 representative occupations such as baker racker, warehouse hand  
6 cutter, and weight tester. Tr. 29.

#### 7 STANDARD OF REVIEW

8 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
9 court set out the standard of review:

10 A district court's order upholding the Commissioner's  
11 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
12 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the  
13 Commissioner may be reversed only if it is not supported  
14 by substantial evidence or if it is based on legal error.  
15 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
16 Substantial evidence is defined as being more than a mere  
17 scintilla, but less than a preponderance. *Id.* at 1098.  
18 Put another way, substantial evidence is such relevant  
19 evidence as a reasonable mind might accept as adequate to  
20 support a conclusion. *Richardson v. Perales*, 402 U.S.  
21 389, 401 (1971). If the evidence is susceptible to more  
22 than one rational interpretation, the court may not  
23 substitute its judgment for that of the Commissioner.  
24 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*  
25 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

26 The ALJ is responsible for determining credibility,  
27 resolving conflicts in medical testimony, and resolving  
28 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
Cir. 1995). The ALJ's determinations of law are reviewed  
*de novo*, although deference is owed to a reasonable  
construction of the applicable statutes. *McNatt v. Apfel*,  
201 F.3d 1084, 1087 (9th Cir. 2000).

29 It is the role of the trier of fact, not this court, to resolve  
30 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
31 supports more than one rational interpretation, the court may not  
32 substitute its judgment for that of the Commissioner. *Tackett*, 180  
33 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
34 Nevertheless, a decision supported by substantial evidence will

1 still be set aside if the proper legal standards were not applied in  
2 weighing the evidence and making the decision. *Browner v. Secretary*  
3 *of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If  
4 substantial evidence exists to support the administrative findings,  
5 or if conflicting evidence exists that will support a finding of  
6 either disability or non-disability, the Commissioner's  
7 determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
8 1230 (9<sup>th</sup> Cir. 1987).

#### 9 SEQUENTIAL PROCESS

10 The Commissioner has established a five-step sequential  
11 evaluation process for determining whether a person is disabled. 20  
12 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.  
13 137, 140-42 (1987). In steps one through four, the burden of proof  
14 rests upon the claimant to establish a prima facie case of  
15 entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99.  
16 This burden is met once a claimant establishes that a physical or  
17 mental impairment prevents him from engaging in his previous  
18 occupation. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a  
19 claimant cannot do his past relevant work, the ALJ proceeds to step  
20 five, and the burden shifts to the Commissioner to show that (1) the  
21 claimant can make an adjustment to other work; and (2) specific jobs  
22 exist in the national economy which claimant can perform. *Batson v.*  
23 *Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-94 (2004).  
24 If a claimant cannot make an adjustment to other work in the  
25 national economy, a finding of "disabled" is made. 20 C.F.R. §§  
26 404.1520(a)(4)(I-v), 416.920(a)(4)(I-v).

#### 27 ISSUES

28 The question presented is whether substantial evidence exists

1 to support the ALJ's decision denying benefits and, if so, whether  
2 that decision is based on proper legal standards. Plaintiff  
3 contends that the ALJ erred by failing to properly weigh the medical  
4 opinions and by finding Plaintiff lacked credibility. ECF No. 16,  
5 21.

#### 6 DISCUSSION

7 The Plaintiff argues that the ALJ erred by failing to provide  
8 a complete hypothetical and by finding Plaintiff's subjective  
9 complaints not credible.<sup>2</sup> ECF No. 16. Specifically, Plaintiff  
10 contends that the hypothetical the ALJ proposed to the vocational  
11 expert was incomplete because it failed to include the multiple  
12 "moderate" limitations assessed by Dr. Flanagan. ECF No. 16 at 13-  
13 14.

14 Opinions from non-examining medical sources are to be given  
15 less weight than treating or examining doctors. *Lester*, 81 F.3d at  
16 831. An ALJ must evaluate the opinion of a non-examining source and  
17 explain the weight given to it. SSR 96-6p. Although an ALJ  
18 generally gives more weight to an examining doctor's opinion than to  
19 a non-examining doctor's opinion, a non-examining doctor's opinion  
20 may nonetheless constitute substantial evidence if it is consistent  
21 with other independent evidence in the record. *Thomas v. Barnhart*,  
22 278 F.3d 947, 957 (9th Cir. 2002).

23 In analyzing medical opinions, the ALJ must do more than merely  
24 state his conclusions: "He must set forth his own interpretations  
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26 <sup>2</sup>Because the first issue requires remand, the court does not  
27 address Plaintiff's claim that the ALJ erred in his credibility  
28 determination.

1 and explain why they, rather than the doctors,' are correct."  
2 *Reddick*, 157 F.3d at 725 (citing *Embrey v. Bowen*, 849 F.2d 418,  
3 421-22 (9th Cir. 1988)). The ALJ's conclusions must be supported by  
4 substantial evidence. *Reddick*, 157 F.3d at 725. A medical opinion  
5 may be rejected by the ALJ if it is conclusory, contains  
6 inconsistencies, or is inadequately supported. *Bray v. Comm'r Soc.*  
7 *Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009); *Thomas*, 278 F.3d  
8 at 957. In assessing a claimant's residual functional capacity, an  
9 ALJ must consider and evaluate the opinions of state agency  
10 physicians or psychologists using all factors set forth in the  
11 regulations for analyzing opinion evidence. SSR 96-6p.

12 In this case, the ALJ's explanation of the weight he gave to  
13 all the medical assessments was provided in a single sentence: "As  
14 for the opinion evidence, the claimant has not had any permanent  
15 limitations or restrictions placed on his ability to perform basic  
16 work activities by any treating or examining physicians." Tr. 28.  
17 This conclusion is not supported by the record.

18 On November 15, 2007, Rita Flanagan, Ph.D., reviewed  
19 Plaintiff's file and completed a check the box Mental Residual  
20 Functional Capacity Assessment. In that assessment, Dr. Flanagan  
21 opined that Plaintiff was markedly limited in his ability to  
22 interact appropriately with the general public. Tr. 371. In the  
23 check-the-box portion of the form, section I, Dr. Flanagan assessed  
24 Plaintiff with moderate<sup>3</sup> limitations in his ability to (1) understand  
25 and remember detailed items; (2) carry out detailed instructions;  
26 (3) maintain attention and concentration for extended periods; (4)

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27  
28 <sup>3</sup>"Moderate" is not defined within the form.

1 work in coordination or proximity to others without being distracted  
2 by them; (5) complete a normal workday and workweek without  
3 interruptions from psychologically based symptoms and to perform at  
4 a consistent pace without an unreasonable number and length of rest  
5 periods; (6) get along with coworkers or peers without distracting  
6 them or exhibiting behavior extremes; and (7) respond appropriately  
7 to changes in the work setting. Tr. 370-71.

8 In section III, the narrative portion of the form, Dr. Flanagan  
9 explained that Plaintiff's allegations "are not fully credible,"  
10 because over time, he reported different symptoms to different  
11 providers. Tr. 372. However, Dr. Flanagan concluded, "[r]egardless  
12 of credibility issues, [claimant] appears to experience bona fide  
13 [symptoms], but would still be capable of [simple work]." Tr. 372.  
14 Dr. Flanagan added that Plaintiff would work best away from the  
15 public, with little interaction, and he could benefit from  
16 additional time to adapt to change in the work setting. Tr. 372.

17 At the hearing, the vocational expert was presented with a  
18 hypothetical that included all the section I "moderate" limitations  
19 assessed by Dr. Flanagan. Tr. 52-53. In response to that  
20 hypothetical, the vocational expert stated, "[a]ssuming that a  
21 person manifests those issues and those problems on a daily basis in  
22 a work setting, one would quickly be terminated." Tr. 53. The  
23 vocational expert also opined that having a single moderate  
24 limitation in the ability to complete a normal workday and workweek  
25 due to psychologically based symptoms that would interrupt a  
26 consistent pace would affect an individual's ability to sustain  
27 employment in an unskilled job because pace is "one of the primary  
28 essential points of an unskilled job." Tr. 53-54.



1 The ALJ found that Plaintiff's RFC included a full range of  
2 work at all exertional levels with the single limitation that  
3 Plaintiff was to have limited contact with peers, supervisors and  
4 the general public, and the ALJ opined that Plaintiff "is able to  
5 sustain concentration necessary for unskilled work." Tr. 24.  
6 Plaintiff contends that the RFC was inaccurate because it failed to  
7 incorporate the multiple "moderate" limitations expressed by Dr.  
8 Flanagan. ECF No. 21 at 6-7. Defendant counters that section I is  
9 "merely a worksheet," is not as important as section III, and cites  
10 an unpublished case as support. ECF No. 20 at 9-10. Inherent in  
11 both parties' argument is the fact that Dr. Flanagan's report  
12 appears internally inconsistent. In section I, the doctor assesses  
13 multiple "moderate" limitations. Tr. 370-71. In section III, the  
14 doctor opined Plaintiff is capable of simple work, but noted  
15 Plaintiff's concentration and persistence will be impaired. Tr.  
16 372. Compounding the problem is the VE opinion that the "moderate"  
17 limitations assessed in section I preclude all work for Plaintiff.

18 The ALJ is responsible for resolving conflicts in medical  
19 testimony. *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).  
20 The ALJ is likewise responsible for resolving ambiguities. See  
21 *Vincent on Behalf of Vincent v. Heckler*, 739 F.2d 1393, 1394 (9th  
22 Cir. 1984); see also *Thorne v. Schweiker*, 694 F.2d 170, 172 (8th  
23 Cir. 1982). In this case, the ALJ failed to explain the weight  
24 given to the individual medical sources and failed to address and  
25 resolve the ambiguities presented by Dr. Flanagan's assessment of  
26 Plaintiff's multiple "moderate" limitations, with the conclusion  
27 that he could work. A valid explanation may exist for the omission  
28 of the section I limitations assessed by Dr. Flanagan, but the ALJ

1 did not provide one. "Regardless whether there is enough evidence  
2 in the record to support the ALJ's decision, principles of  
3 administrative law require the ALJ to rationally articulate the  
4 grounds for h[is] decision and [the courts] confine our review to  
5 the reasons supplied by the ALJ." *Steele v. Barnhart*, 290 F.3d 936,  
6 941(7th Cir. 2002) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 93-95,  
7 63 S.Ct. 454, 87 L. Ed. 626 (1943) (other citations omitted)).

8 In this case, the ALJ failed to specify the weight he gave to  
9 the medical assessments in the record. Additionally, the ALJ  
10 failed to provide an explanation for rejecting the moderate  
11 limitations assessed by Dr. Flanagan. These limitations were not  
12 included in the hypothetical posed to the VE. As a result, the  
13 hypothetical was incomplete and the VE's testimony predicated upon  
14 the incomplete hypothetical was of "no evidentiary value." See  
15 *Carmickle*, 533 F.3d at 1166 (VE's testimony "has no evidentiary  
16 value" where hypothetical question is incomplete); *Lewis v. Apfel*,  
17 236 F.3d 503, 517 (9th Cir. 2001).

18 When an ALJ's denial of benefits is not supported by the  
19 record, "the proper course, except in rare circumstances, is to  
20 remand to the agency for additional investigation or explanation."  
21 *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (internal  
22 quotation marks omitted). The court may exercise discretion and  
23 direct an award of benefits "where no useful purpose would be served  
24 by further administrative proceedings and the record has been  
25 thoroughly developed." *Swenson v. Sullivan*, 876 F.2d 683, 689 (9th  
26 Cir. 1989). Remand for further proceedings is appropriate where  
27 outstanding issues exist that must be resolved before a  
28 determination can be made, and it is not clear from the record that

1 the ALJ would be required to find the claimant disabled if all the  
2 evidence were properly evaluated. See *Vasquez v. Astrue*, 572 F.3d  
3 586, 593 (9th Cir. 2009).

4 In this case, the ALJ failed to provide a specific analysis  
5 related to the medical opinion evidence, and thus it is not possible  
6 for the court to review whether the medical evidence was properly  
7 evaluated. See *Lewin v. Schwieker*, 654 F.2d 631, 634 (9th Cir.  
8 1981)(ALJ must make fairly detailed findings in support of  
9 administrative decisions to permit courts to review those decisions  
10 intelligently). As such, remand for additional proceedings is  
11 necessary.

#### 12 CONCLUSION

13 Having reviewed the record and the ALJ's findings, the court  
14 concludes the ALJ's decision is not supported by substantial  
15 evidence and is based on legal error. On remand, the ALJ shall  
16 specifically explain the weight given to all medical source opinions  
17 and resolve conflicts between and apparent ambiguities within the  
18 medical opinions, and if necessary, provide explanation for why  
19 significant probative evidence has been rejected. See, *Vincent v.*  
20 *Heckler*, 739 F.2d 1393, 1394-1395 (9th Cir. 1984). The decision is  
21 therefore **REVERSED** and the case is **REMANDED** for further proceedings  
22 consistent with this opinion. Accordingly,

#### 23 IT IS ORDERED:

24 1. Plaintiff's Motion for Summary Judgment, **ECF No. 16**, is  
25 **GRANTED** and the matter is **REMANDED** to the Commissioner for  
26 additional proceedings.

27 2. Defendant's Motion for Summary Judgment, **ECF No. 20**, is  
28 **DENIED**.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff, and the file shall be **CLOSED**.

DATED August 27, 2013.

S/ CYNTHIA IMBROGNO  
UNITED STATES MAGISTRATE JUDGE